

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)

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Deployment of Wireline Services)

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Offering Advanced Telecommunications)

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Capability)

)

CC Docket No. 98-147

**REPLY COMMENTS OF
KMC TELECOM, INC.**

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SUMMARY

The Commission's proposal to permit incumbent local exchange carriers (LECs) to establish deregulated separate advanced services affiliates is both misguided and unlawful. Comments by incumbent LECs show that this regulatory option will not achieve the Commission's objective of promoting advanced services because incumbent LECs have no interest in providing service through an affiliate that is genuinely independent. At the same time, their separate affiliate proposals would permit a degree of joint operation that would make the affiliate a "successor or assign" subject to the obligations of the parent incumbent LEC. Accordingly, the Commission should not adopt its advanced services affiliate proposal.

KMC believes that the best way to encourage the provision of advanced services by incumbent and competitive LECs is to fully enforce and implement the interconnection and unbundling obligations of the Act. KMC urges the Commission to adopt the further opportunities for collocation and enhanced uses of the local loop offered for comment in this proceeding. Incumbent LECs in initial comments have not shown that these proposals should not be adopted. The Commission should additionally designate inside wiring as a network element subject to the unbundling obligation of Section 251(c)(3). The Commission should not adopt its proposal to permit Bell Operating Companies (BOCs) to modify LATA boundaries in order to promote access to the Internet backbone.

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KMC Telecom, Inc. ("KMC"), respectfully submits the following reply comments in the above-captioned proceeding concerning deployment of advanced telecommunications capability to all Americans.¹ KMC submitted initial comments in this proceeding.²

I INTRODUCTION

KMC believes that the most significant steps the Commission could take in this proceeding to promote competition and provision of advanced services would be to adopt strengthened collocation and loop unbundling requirements such as proposed or offered for comment in the *Section 706 Order and NPRM*. These measures can help assure that new entrants will be able to obtain interconnection and key network elements that are required for provision of competitive and advanced services on reasonable terms and conditions and in a

¹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188, released August 7, 1998 ("*Section 706 Order and NRPM*").

² Comments of KMC Telecom, Inc. filed September 25, 1998.

timely manner. These measures, rather than the Commission's unrealistic and unlawful separate affiliate concept, are most likely to promote the key goals of the 1996 Act.

II SEPARATE AFFILIATES

In the *Section 706 Order and NPRM*, the Commission proposed to establish regulations permitting an affiliate of an incumbent LEC to offer advanced services free from the key market-opening provisions of the 1996 Act.³ KMC submits that initial comments show that this proposal would not achieve the Commission's objectives and that any such affiliate would be a "successor or assign" under Section 251(h).

In their initial comments, incumbent local exchange carriers (LECs) fundamentally refute the key assumption of the Commission motivating its separate affiliate proposal - that incumbents would be encouraged to provide advanced services if they are permitted to do so on an unregulated basis through a "truly" independent separate affiliate. These comments make clear that incumbents will never be motivated to provide advanced services through an entity that operates separately from the incumbent. Thus, they contend that the costs and alleged inefficiencies of establishing a separate affiliate will reduce or eliminate any incentive to provide advanced services in that manner.⁴ Given these statements by incumbent LECs the Commission cannot rationally conclude on the present record that its "truly separate" affiliate proposal would promote its stated objectives. Therefore, the Commission may not adopt it.

³ 47 U.S.C. Sec. 251(h)(1); *Section 706 Order and NPRM* at para. 92.

⁴ Bell Atlantic at 23; BellSouth at 13; Cincinnati Bell Telephone at 4-8; GTE at 38; United States Telephone Association at 4; US WEST at 17,18; Moultrie Telephone Company at 4; National Telephone Cooperative Association at 3; National Rural Telephone Association at 6.

Moreover, KMC submits that any of the modifications to the Commission's proposal that might induce incumbent LECs to establish an advanced services affiliate would involve a substantial degree of joint operation and enterprise that would make the affiliate a successor or assign. The suggestion, for example, that *Computer III*⁵ nonstructural safeguards should be employed instead of structural separation would involve direct provision of advanced services by the incumbent that would, consequently, be fully subject to Section 251(c) obligations.

Similarly, the proposal that the Commission impose separation requirements based on those adopted in *Competitive Carrier* for provision of long distance services by independent LECs would make the affiliate a successor or assign.⁶ These standards would apparently permit

⁵ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer III)*, Report and Order, CC docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) (*Phase I Order*), recon., 2 FCC Rcd 3035 (1987) (*Phase I Recon. Order*), further recon., 3 FCC Rcd 1135 (1988) (*Phase I Further Recon. Order*), second further recon., 4 FCC Rcd 5927 (1989) (*Phase I Second Further Recon.*), *Phase I Order and Phase I Recon. Order*, vacated, *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), recon., 3 FCC Rcd 1150 (1988) (*Phase II Recon. Order*), further recon., 4 FCC Rcd 5927 (1989) (*Phase II Further Recon. Order*), *Phase II Order vacated*, *California I*, 905 F.2d 1217 (9th Cir. 1990); *Computer II Remand Proceedings*, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), recon., 7 FCC Rcd 909 (1992); *pets. for review denied*, *California v. FCC*, 4 F3d 1505 (9th Cir. 1993) (*California II*); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), recon. dismissed in part, *Order*, 11 FCC Rcd 12513 (1996); *BOC Safeguards Order vacated in part and remanded*, *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), cert. denied, 115 S.Ct. 1427 (1995) (*referred to collectively as the Computer III proceeding*). The Commission is addressing modifications to those rules in another proceeding. *Computer III Further Remand Proceedings, Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20 and 98-10, Further Notice of Proposed Rulemaking, 13 FCC Rcd 1640 (1998).

⁶ *Policy and Rules Concerning rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, Fifth Report and Order, CC Docket 79-252, 98 FCC 2d 1191 (1984). Under these requirements, according to incumbent LEC commenters, the affiliate would

common personnel, joint management, joint ownership of all facilities other than local exchange service facilities, and complete ownership and direction of the affiliate by the incumbent. KMC submits that this degree of joint enterprise would make the affiliate a successor or assign. KMC believes that incumbents' proposed reliance on the Commission's affiliate transaction rules would be completely misguided as those rules permit virtually any transaction between an incumbent and its affiliate as long as certain pricing standards are met.⁷ Thus, these rules would provide no assurance that the affiliate would be operating independently.

For these reasons, KMC submits that, as shown in initial comments, the Commission's proposal to give incumbent LECs the incentive to provide advanced services through a separate affiliate is fundamentally flawed. In essence, if the separate affiliate is truly independent incumbent LECs will have no desire to establish it. On the other hand, based on incumbent LECs comments, in order to give incumbent LECs an incentive to establish any such affiliate, the Commission must cross the line to permit a degree of joint operation that will make the affiliate a successor or assign under Section 251(h). Accordingly, KMC urges the Commission to abandon its proposal. Instead, at most, the Commission should permit the incumbent to initially establish

not be deemed an incumbent if it (1) maintains separate books of account, (2) does not jointly own transmission or switching facilities with the incumbent that the incumbent used for the provision of local exchange services in the same in-region market, (3) acquires telecommunications facilities, services, or network elements from the affiliate LEC pursuant to tariff or negotiated agreement under Section 251 and 252 of the Act, and (4) acquires non-telecommunications services from the incumbent on an arms length basis pursuant to the Commission's affiliate transaction rules. BellSouth at 34-35, 37; GVNW at 3; TCA at 6; US WEST at 25-28.

⁷ See 47 C.F.R. Section 32.27.

an advanced services affiliate with a small amount of start-up capital, and then divest it to its stockholders.

KMC agrees with incumbent LEC commenters who contend that the separate affiliate proposal would not be workable absent preemption of state regulation of the affiliate.⁸ As KMC pointed out in its comments, absent preemption states could effectively eviscerate whatever safeguards the Commission adopts by permitting more lenient transactions for provision of intrastate advanced services.⁹ However, KMC does not share incumbent's LEC concerns that states would adopt more stringent safeguards. More stringent safeguards would not undercut the Commission's safeguards. Rather, the Commission should preempt more lenient state safeguards, as urged by KMC.

III THE COMMISSION SHOULD ADOPT STRENGTHENED COLLOCATION AND LOOP UNBUNDLING REQUIREMENTS

National Standards. As noted, KMC believes that strengthened collocation and unbundling requirements would significantly promote the Commission's goals in this proceeding. In addition, KMC urges the Commission to adopt national standards. As pointed out by KMC in initial comments,¹⁰ incumbent LECs are inconsistent in their standards for collocation and unbundling. This frustrates and delays new entrants ability to operate in multiple

⁸ GTE at 28-29; CBT at 18; Kiesling Consulting LLC at 11; US WEST at 34.

⁹ KMC Comments at 12.

¹⁰ KMC Comments at 21, 27.

states. Incumbent LEC comments prove this point. Thus, for example, Ameritech permits cageless collocation while others do not.¹¹

In addition, the Commission should determine that what is technically feasible for one incumbent LEC is technically feasible for all incumbents. Other than vague, unsupported allegations in opposition to national standards, incumbent LECs have not shown that their networks or operating conditions are so different that national standards would not be reasonable. Indeed, all incumbent LECs rely on the same technologies and operating standards. BellSouth's contention that local building codes prevent national collocation standards¹² is particularly unpersuasive since building codes, in fact, are usually based on national construction standards such as the National Electric Code.

Cageless Collocation. Cageless collocation would provide new entrants a significant opportunity to collocate equipment in incumbent central offices without incurring the significant costs and delays of obtaining and installing cages. Incumbents opposing cageless collocation have not shown that more affordable central office security measures, such as electronic monitoring, would not provide adequate security. And, as noted, some incumbents permit cageless collocation. Accordingly, the Commission should adopt cageless collocation as an elective method of collocation.

Equipment Eligible for Collocation. The Commission should reject incumbent LECs' requests that only equipment used exclusively for interconnection or access to unbundled

¹¹ Ameritech at 42.

¹² BellSouth at 46.

network elements should be eligible for collocation.¹³ As noted in the *Section 706 Order and NPRM*, the latest telecommunications equipment can perform a number of functions beyond the narrow functions of interconnection or access to unbundled network elements.¹⁴ It would impose significant costs on new entrants if they were required to purchase multiple pieces of equipment instead of being able to take advantage of more efficiently designed equipment - especially when incumbents are using such equipment. The Commission should permit collocation of any equipment that is used for either interconnection and access to unbundled elements even if also used for other telecommunications functions such as switching, as well as more broadly allowing collocation of any telecommunications equipment that would facilitate provision of competitive or advanced services.

Installation Intervals. The Commission should additionally adopt presumptive time intervals for provision of collocation and unbundled elements. Incumbents' suggestion that the timeliness of their provision of collocation and unbundled network elements should be supervised on a case-by-case basis by state authorities¹⁵ would merely preserve the *status quo*. KMC's experience is that after-the-fact review of the timeliness of incumbents' provisioning of collocation and unbundled network elements are inadequate to assure a realistic opportunity to provide competitive services because delays, once they have occurred, leads to irretrievable loss

¹³ Ameritech at 39; Bell Atlantic at 38-39; CBT at 20-21; GTE at 61-62; SBC at 15-16; US WEST at 36-38.

¹⁴ *Section 706 Order and NPRM* at para. 128.

¹⁵ Ameritech at 46; BellSouth at 46-47; CBT at 24; GTE at 97; SBC at 29, 45; US WEST at 42.

of customers. The Commission should eliminate this opportunity to thwart competitive provision of services by imposing reasonable national time intervals for incumbent LECs to meet their collocation and unbundling obligations under the Act.

Reporting Requirements. Similarly, the Commission should reject incumbent LECs' request that the Commission should allow parties to resolve issues concerning the need for information on availability of collocation space or conditioned loops on a case-by-case basis.¹⁶ It will do new entrants little good to successfully resolve disputes of this nature after-the-fact once the customer has gone to other providers or the incumbent has signed up the customer. Only up-front disclosures of this information will enable new entrants to successfully compete for customers by knowing when and where collocation space or conditioned loops are available to enable provision of service. Incumbents have not shown that publishing information concerning the availability of collocation space in each of their central offices or conditioned loops would impose infeasible requirements or unreasonable burdens. Accordingly, the Commission should adopt these disclosure requirements.

Tours of Central Offices. KMC urges the Commission to reject incumbent's claim that it would be overly burdensome to require them to provide tours of central offices when they deny collocation for lack of space.¹⁷ Simply stated, it will not be unreasonably burdensome to require the simple task of conducting a tour of the central office. Incumbent claims that this could

¹⁶ BellSouth at 47, 48; CBT at 22; GTE at 74, 82-83; GVNW at 9, 11; SBC at 20, 31; Ameritech at 16; New World Paradigm at 1-5; US WEST at 44.

¹⁷ Ameritech at 47; Bell Atlantic at 43; BellSouth at 47; CBT at 26; GTE at 72; SBC at 29; US WEST at 43.

compromise security or violate intellectual property rights are unsupported and/or unexplained and should also be rejected.

Provision of Conditioned Loops. As explained by KMC and other commenters, conditioned loops are essential for provision of advanced services such as DSL.¹⁸ Unless incumbents are required to provide conditioned loops on request, new entrants will not be able to provide advanced services except where the loop in question is already free of loading coils, bridge taps, and other devices that can interfere with provision of advanced services. Moreover, the requirement that incumbents provide conditioned loops does not constitute a requirement that incumbents provide a superior quality network. Loop conditioning - removing or installing various devices on the loop - is an everyday activity that is essential to ensure that the loop is technically able to provide various requested services. Accordingly, the Commission should reject incumbents' attempts to characterize a loop conditioning requirement as requiring them to provide special, or superior service.¹⁹ KMC urges the Commission to promptly adopt a requirement that incumbent LECs provide conditioned loops.

Sub-Loop Unbundling. KMC disagrees with Bell Atlantic's assertion that nothing has changed since the Commission in the *Local Competition Order* declined to require sub-loop unbundling.²⁰ What has changed is that the Commission now has had two years experience with

¹⁸ KMC Comments at 19.

¹⁹ Ameritech at 11; Bell Atlantic at 47; US WEST at 45-46.

²⁰ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.96-98, First Report and Order, 11 FCC Rcd 15499, para. 391 (1996) (*Local Competition Order*), *vacated in part, aff'd in part*, Iowa Utils. Bd. V. FCC, 120 F.3d 753 (8th Cir. 1997), *cert. granted on other grounds sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118

implementation of the 1996 Act and the pace of development of local competition. And, that pace is clearly not fast enough. This is a sufficiently changed or new circumstance to enable the Commission to reasonably conclude that, in light of its experience since 1996, it should require sub-loop unbundling in order to promote the goals of the Act.

Loop Spectrum Sharing. The Commission should also require incumbents to offer as an unbundled network element only part of the capacity of a loop, such as the capacity to provide DSL, while leaving other capacity to continue to be used by the incumbent or a purchaser of such capacity. There is no question that multiple services can be provided over the loop. Thus, GTE in its federal DSL tariff proposes to offer DSL capacity to independent providers while continuing to use the loop to provide voice service.²¹ Therefore, loop spectrum sharing is technically feasible. Spectrum sharing would provide new entrants with significant opportunities to use the loop to provide new services. Accordingly, the Commission should require incumbents to offer loop sharing.

IV INSIDE WIRING SHOULD BE DESIGNATED AN UNBUNDLED NETWORK ELEMENT

As explained by KMC in its reply comments in the *Section 706 Inquiry* proceeding,²² new entrants are not able as a practical matter to meet customers' requests for

S.Ct. 879 (1998).

²¹ See GTE Transmittal No. 1148, filed May 15, 1998; *Order Designating Issues for Investigation*, DA 98-1667, CC Docket No. 78-79 (Com. Car. Bur., rel. August 20, 1998).

²² *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such*

service in multi-unit buildings unless they are able to access wiring and/or conduit inside the building. Incumbent LECs and building owners are in some cases unreasonably restricting the ability of new entrants to meet the service requests of building tenants by restricting or prohibiting access to inside wiring. KMC has urged the Commission to initiate a proceeding to update its inside wiring rules in light of goals of the 1996 Act and to immediately declare unlawful arrangements between building owners and incumbent LECs that provide for exclusive access to inside wiring by the incumbent.²³ KMC additionally urges that the Commission declare in this proceeding that inside wiring, including individual components of such wiring, such as entrance facilities, utility closets, cross-connects, riser cable, and horizontal distribution cable, are unbundled network elements.

In the *Section 706 Order and NPRM*, the Commission sought comment on the extent to which it should establish additional national rules for local loops pursuant to Sections 201 and 251 in order to remove barriers to entry and speed the deployment of advanced services.²⁴ Where the demarcation point between LEC-owned and customer-owned wiring in multi-unit buildings is within the building, the local loop will extend into the building all the way to the individual customer's premises.²⁵ Thus, inside wiring can comprise part of the local loop. The

Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Notice of Inquiry, CC Docket No. 98-146, FCC 98-187, released August 7, 1998.

²³ Reply Comments of KMC Telecom, Inc., CC Docket No. 98-146, filed October 8, 1998.

²⁴ *Section 706 Order and NPRM* at para. 154.

²⁵ See 47 C.F.R. Section 68.213(a) and (b); *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 88-57 (Review of Sections 68.104 and 68.213 of the

Commission has acknowledged that incumbent-owned inside wiring constitutes “the last hundred feet” of the local loop.²⁶ In addition, access to inside wiring is a type sub-loop unbundling. Accordingly, KMC submits that the issue of whether inside wiring should be an unbundled network element is within the scope of notice provided by the *Section 706 Order and NPRM*.

Section 251(c)(3) requires incumbent LECs to offer access to network elements on an unbundled basis at any technical feasible point.²⁷ Section 251(d)(2) requires the Commission, in determining what network elements should be made available on an unbundled basis, to consider whether an element is proprietary and whether the unavailability of the element would impair the ability of requesting carriers to provide service. KMC submits that inside wiring meets these standards for unbundled network elements. Thus, it is technically feasible for incumbents to provide access to inside wiring components. Nor is inside wiring proprietary. And, absent access to the inside wiring, new entrants cannot, as a practical matter, provide service to tenants in the building. In addition, a Commission determination that inside wiring, and its components, constitute unbundled network elements would set a meaningful national standard that would greatly facilitate the ability of new entrants to provide competitive and advanced services.

Commission’s Rules Concerning Competition of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68-213 of the Commission’s Rules filed by the Electronic Industries Association), 5 FCC Rcd 4686 (1990).

²⁶ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, CC Docket No. 98-146, FCC 98-187, released August 7, 1998, (“NOI”). *Section 706 NOI* at para. 53.

²⁷ 47 U.S.C. Section 251(c)(3).

Accordingly, KMC urges the Commission in this proceeding to designate inside wiring and its components as network elements to which incumbent LECs must provide unbundled access.

It will be also essential that incumbent LECs provide access to inside wiring at rates that are just and reasonable as required by Section 251(c)(3). KMC believes that at this point most incumbent LECs will have fully depreciated inside wiring. Accordingly, KMC believes that access to inside wiring should be provided at essentially no charge.

V INTERLATA RELIEF

For the most part, incumbent LECs' contentions on this issue in initial comments amount to no more than requests to be relieved in general from the interLATA restrictions of Section 271.²⁸ As the Commission has already concluded, this would be unlawful absent full compliance with the market-opening provisions of Section 271.²⁹

Moreover, it is not necessary to authorize BOCs to move LATA boundaries to promote access to the Internet backbone. As explained by KMC in its earlier comments, many such carriers are able and willing to provide high speed access to the Internet. There is no rational basis to assume that other carriers will not do so where demand for this access exists. Moreover, as also explained previously, allowing BOCs to move LATA boundaries so that Internet nodes would be encompassed within one LATA rather than another LATA would essentially eviscerate the interLATA restrictions as any meaningful limit on BOCs ability to provide interLATA

²⁸ Ameritech at 58, 62; Bell Atlantic at 3-4; BellSouth at 32-33; SBC at 10; US WEST at 50-54.

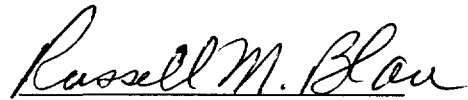
²⁹ *Section 706 Order and NPRM* at para. 18.

service. Accordingly, the Commission should not proceed with its proposal to permit BOCs to move LATA boundaries in order to promote access to the Internet backbone.

VI CONCLUSION

For the foregoing reasons, KMC respectfully requests that the Commission not adopt its proposal to permit incumbent LECs to offer advanced telecommunications capabilities on an unregulated basis through a separate affiliate. KMC urges the Commission to adopt its proposed strengthened collocation and unbundling requirements.

Respectfully submitted,



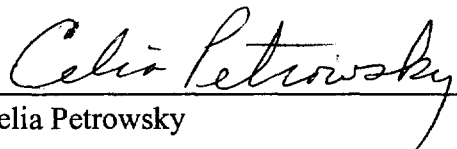
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